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Article 16 concerning free movement of services in the Services Directive

At the centre of this paper stands Article 16 of the Services Directive. This provision is the crucial one in the Directive's regulation of free movement of services. The paper seeks to assess the relation between the Directive's Article 16 and the case law hitherto developed on the basis of primary law; the questions that the paper seeks to answer are: Does Article 16 codify the case law hereto; does Article 16 go beyond a codification; in the affirmative, in what respects; and if so, will Article 16 be successful?

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1 Introduction

The object of this paper is to discuss the central provision of the general Services Directive on free movement of services, Article 16.

The provisions concerning free movement of services are to be found in Section 1 of Chapter IV of the Directive. The Chapter is entitled "Free Movement of Services" and the Section is entitled "Freedom of provide services and related derogations". Centrally stands Article 16 of the Directive on the restrictions that are allowed on the free movement of services.

The first topic for discussion in relation to Article 16 is how the provision should be interpreted. As there is hardly any case law on the provision, the discussion largely takes place on the basis of legal literature. The discussion also requires presentation of a number of other provisions of the Directive. The discussion must obviously also take into account the case law developed prior to the Directive.

The second topic to be discussed is whether Article 16 will achieve the objective assigned to it. This discussion requires a presentation as to how the case law on free movement of services has developed. The discussion also requires that case law on other freedoms is presented, in particular the free movement of goods.

To get a better understanding of the Services Directive and how European Law works, I will start by explaining the European Union (EU) and how it has become what it is today.

1.1 The European Union

The European Union (EU) consists of by now 27 Member States in Europe which have joined forces for their mutual benefit. To begin with, the EU was largely concerned with solely an economic cooperation, but its fields of action have in the course of the years been

expanded so that they now include, amongst others, environmental, asylum and judicial politics. The inspiration for the EU grew out of the misery left behind after Europe had experienced two damaging world wars and a serious economic depression. At the time, some countries in Western Europe looked for ways to make sure that they never went to war against each other again. In 1950, Jean Monnet and Robert Schuman, both frenchmen, put forward a plan that would prevent another war between France and Germany. They proposed that the coal and steel production – indispensable elements for conducting war – should be put under the control of a common 'High Authority'; the initiative was also to be open for participation from other countries. The Treaty of Paris established the European Coal and Steel Community (ECSC) in 1951, with Italy, Belgium, the Netherlands and Luxemburg also included. The success of the ECSC led its Member States to sign the Rome Treaties in 1957, one concerning nuclear matters – the EURATOM Treaty – the other concerning the establishment of a common market – The EEC Treaty.[1] The EEC Treaty, which is the one relevant in this context, sets out four economic freedoms: free movement of goods, free movement to provide services, free movement of capital and free movement of persons. The background to the Four Freedoms was that the EU wanted one big market with free movement and equal conditions for competition. The EEC came into effect in 1958. The EEC Treaty, generally called the common market, later became known as the European Community (EC). By 1986, the number of countries in the EC had doubled to 12; and, as a result of the Maastricht Treaty, signed in 1992, these countries decided to change the name to the 'European Union'. The main purpose of the Maastricht Treaty was to prepare for European Monetary Union and introduce elements of a political union (citizenship, provisions on foreign policy and on home and justice affairs). Today the European Union (EU) consists of 27 Member States and other countries are applying to be part of the Union.

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[1] http://europa.eu/eu-law/treaties/index_en.htm (Europa.eu is the official website of the European Union.)

1.2 Basic features of the European Union

The European Union is based on the rule of law. This means that every action taken by the EU is founded on treaties that have been approved voluntarily and democratically by all EU Member States. A treaty is a binding agreement between EU Member States. It sets out EU objectives, rules for EU institutions, how decisions are made and the relationship between the EU and its Member States. Treaties are amended to make the EU more efficient and transparent, to prepare for new member countries and to introduce new areas of cooperation.[2]

Five treaties have been adopted so far, with the last being the Treaty of Lisbon in 2007 (entered into force in 2009). The purpose of the treaty was *"to make the EU more democratic, more efficient and better able to address global problems, such as climate change, with one voice*.[3] The Lisbon Treaty amended the Treaty on European Union (TEU) and the Treaty Establishing the European Community (TEC). Through the Treaty of Lisbon, the Treaty of Rome changed its formal name from the Treaty establishing the European Union (TEC) to the Treaty on the Functioning of the European Union (TFEU). The Maastricht Treaty has, with amendments, kept its previous title Treaty on the European Union (TEU).[4]

Several types of legal acts achieve the aims set out in the EU treaties. The starting point is that secondary legislation, such as the Services Directive, cannot be contrary to the Treaty. This is illustrated in the *Commission of the European Communities v Council of the Euro-*

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[2] http://europa.eu/eu-law/treaties/index_en.htm

[3] http://europa.eu/eu-law/treaties/index_en.htm

[4] In the following, I will refer to the Treaty on the Functioning of the European Union as the TFEU or the Treaty, but I will also refer to the old Articles in the TEC in brackets, since the TFEU is relatively new.

pean Communities case.[5] Some of the legal acts, regulations, directives, decisions, recommandations and opinions, are binding and others are not. A directive is a legislative act that sets out a goal that all EU countries must achieve. It is, however, up to the individual countries to decide the implementation methode.[6]

1.3 The European Court of Justice and preliminary rulings and The European Commission

The European Court of Justice (ECJ) is the institution of the European Union that compasses the whole judiciary. The ECJ interprets EU law to make sure it is applied in the same way in all EU countries. Its mission has been to ensure that "the law is observed" "in the interpretation and application" of the Treaties.[7] The reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union, i.e. Article 267 TFEU (ex Article 234 TEC). This procedure enables national courts to question the Court of Justice on the interpretation or validity of European law. The reference of a preliminary ruling is not a recourse taken against a European or national act, but a question presented on the application of European law.[8]

The European Commission is one of the main institutions of the EU. It oversees and implements EU policies, among other things. The Commission's role is also to ensure that EU law is properly applied - by individuals, national authorities and other EU institutions.

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[5] Case C-218/82 *Commission of the European Communities v Council of the European Communities* [1983] ECR 4063, para. 2.

[6] http://europa.eu/about-eu/basic-information/decision-making/legal-acts/

[7] I.e. Article 19 TEU.

[8] http://europa.eu/legislation_summaries/institutional_affairs/decisionmaking_process/l14552_en.htm

1.4 The EEA Agreement and the EFTA Court

The Agreement on the European Economic Area (EEA) is an agreement between the Member States of the European Union and the Member States of the European Free Trade Association (EFTA), with the exception of Switzerland which is part of EFTA, but not part of the EEA agreement. Thus, the three other EFTA States, Iceland, Lichtenstein and Norway, are part of the European Economic Area. This agreement allows the three EFTA States to participate in the EU´s internal market without being members of the European Union. At the core of the internal market are the four freedoms mentioned above. The internal market is also known as the single market and formerly known as the common market.[9] The EEA Agreement entered into force on 1 January 1994.

The European Free Trade Association (EFTA) Court has jurisdiction with regard to the EFTA States which are parties to the EEA Agreement. The Court is mainly competent to deal with infringement actions brought by the EFTA Surveillance Authority against an EFTA State with regard to the implementation, application or interpretation of an EEA rule, for the settlement of disputes between two or more EFTA States, for appeals concerning decisions taken by the EFTA Surveillance Authority and for giving advisory opinions to courts in EFTA States on the interpretation of EEA rules. The EFTA Court has jurisdiction to give judgment in the form of an advisory opinion on the interpretation of the EEA Agreement after a request of a national court of an EFTA State. The referring national court will then decide the case based on the EFTA Court's answer. Judgments in the form of an advisory opinion are not legally binding on the national court. In practice, they are, however, not weaker than the preliminary rulings rendered by the European Court of Justice under Article 267 TFEU (ex Article 234 TEC). The EFTA Court follows the interpreta-

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[9] Mortelmans, Kamiel *The Common Market, the Internal Market and the Single Market. What's in a Market,* CMLRev (1998), p. 101.

tion laid down by the European Court of Justice, since the goal is to have homogeneous interpretation of the law in the European Economic Area.[10]

2 Free movement of services

2.1 The four freedoms and the freedom to provide services

As I have mentioned above, at the core of the internal market one finds the provisions on the four freedoms. The provisions on the four freedoms fall in five set of rules; namely free movement of goods, free movement of workers, freedom of establishment, freedom to provide services and free movement of capital. It is useful to set out in general the case law on the four freedoms, even though this paper is concerned just with the freedom to provide services – and that only to a limited extent. The reason is that there are matters that are common to the four freedoms; therefore case law concerning a freedom different from the freedom to provide services will also be mentioned below. The four freedoms seek to ensure that there can be a free flow of goods, services, capital and persons across national borders. The objective is thus that national borders and different national rules should not be an obstacle to that flow.

The means by which this objective is to be attained, are a prohibition of discrimination on grounds of nationality and prohibition of national rules that may function as barriers to that free flow. These last rules are normally referred to as ”restrictions”.

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[10] See cases E-1/03 *ESA v Iceland* 2003 EFTA Court Report 143, which, in para. 27, referred to the case C-452/01 *Margarethe Ospelt and Schlössle Weissenberg Familienstiftung* [2003] ECR I-9743 and E-1/04 *Fokus Bank ASA v The Norwegian State, represented by Skattedirektoratet (the Directorate of Taxes)*, which, in para. 22, referred to case C-286/02 *Bellio F.lli Srl v Prefettura di Treviso* [2004] ECR I-3465.

These two prohibitions are essential to understanding the internal market and I shall explain them below. However, before I do so, I shall mention that the prohibitions are not absolute. That means that although a national rule may be discriminatory or hindering free flow over national borders; EU law may accept it. In the terminology that is usual in EU law, one says that the national rule may be justified. After having set out the meaning of discrimination and restrictions, I will deal with the possible justification of discriminatory or restrictive national rules.

2.2 Discrimination

The principle of non-discrimination on grounds of nationality[11] is one of the most fundamental principles of the European Union. According to the Treaty Article 18 (ex Article 12 TEC), any discrimination on grounds of nationality *"shall be prohibited"*.[12] The non-discrimination principle on the basis of nationality is a general principle of EU law and measures against it are illegal per se, but this only applies with certain modifications or clarifications. Discrimination can be accepted if there are objective reasons, i.e. justification grounds.[13]

The ban on discrimination is contained not only in the general provision mentioned, i.e. Article 18 TFEU; it is also part of each of the bans concerning one of the freedoms. It follows from case law that the general ban is not applicable to the extent that one of those provisions apply.[14]

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[11] I.e. Article 20 TFEU (ex Article 17 TEC) a person who is a national or a Member State is also a Union Citizen.

[12] For legal persons it is about prohibition against discrimination based on where the legal person is established, cf. Article 54 TFEU (ex Article 48 TEC).

[13] Sejersted, Arnesen, Rognstad and others *EØS-rett*, 2nd edition, 2004, p. 448.

[14] See cases 305/87 *Commission of the European Communities v Hellenic Republic* [1989] ECR 1461, paras. 12-13, C-443/06 *Erika Waltraud Ilse Hollmann v Fazenda Pública*

The ban on discrimination applies when a national rule applies criteria of nationality, for instance a national rule providing that only nationals can apply for a given position. Such rules are called directly discrimination. Another term used for referring to direct discrimination is overt discrimination.

2.3 Indirect discrimination

The prohibion of discrimination is not limited to just direct discrimination. So-called indirect or covert discrimination also falls within the ban. The notion of indirect discrimination does not appear in the TFEU, but it appears in the case law of the ECJ. In one of the first cases concerning such discrimination, the *Sotgiu* case[15], the ECJ described it as

"The rules regarding equality of treatment between nationals and non-nationals forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead to the same result".[16]

In this case the Court considered that the rules regarding equality of treatment within Union law prohibit overt discrimination because of nationality. Furthermore, all forms of discrimination, which, by application of other criteria of differentiation lead, in fact, to the same result, are forbidden. Residence requirements may constitue indirect discrimination. However, the ban on indirect discrimination is not limited to residence requirements. All national rules that work to the particular detriment of nationals of other Member States, affect es-

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[2007] ECR I-8491, para. 28 and C-269/07 *Commission of the European Communities v Federal Republic of Germany* [2009] ECR I-7811, para. 98.

[15] Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153.

[16] Case 152/73 *Giovanni Maria Sotgiu v Deutsche Bundespost* [1974] ECR 153, para. 11.

sentially those nationals or which can more easily be complied with by nationals of the Member State at issue may be considered indirectly discriminatory.[17]

Although indirect discrimination is not limited to residence requirements, it seems that in practice it is the most common type of indirect discrimination.[18]

Similiar to residence requirements are national rules that require establishment in the territory of the Member State at issue for a service to be provided. Such establishment requirements will normally not be treated by the ECJ as indirect discrimination under the provision concerning freedom to provide services; rather the ECJ will find that the requirements entails an outright negation of the freedom.[19] This result seems to me understandable. The TFEU provides both for freedom of establishment and for freedom to provide services. If a Member State would be allowed to impose an establishment requirement it would mean that there would be no freedom to provide services; there would only be a freedom (or an obligation?) of establishment.

2.4 Restrictions

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[17] Case C-237/94 *John O´Flynn v Adjudication Officer* [1996] ECR I-2617, para. 18.

[18] See for instance cases C-175/88 *Klaus Biehl v Administration des contributions du grand-duché de Luxembourg* [1990] ECR I-1779 and C-112/91 *Hans Werner v Finanzamt Aachen-Innenstadt* [1993] ECR I-429. See also Craig and De Búrca *EU Law: Text, Cases and Materials,* 4th edition, Oxford University Press, 2008, p.759, which states that *"a common species of indirect discrimination is where benefits are made conditional, in law or fact, on residence or place-of-origin requirements"*.

[19] Cases C-205/84 *Commission of the European Communities v Federal Republic of Germany* ECR 3755, C-154/89 *Commission of the European Communities v French Republic* [1991] ECR I-659 and C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC)* [2002] ECR I-9919.

The provisions on the four freedoms are not limited to prohibiting discrimination. The provisions also imply that ”restrictions” are banned. The ECJ has interpreted the notion of ”restrictions” widely, as in for instance in the *Säger* case[20] where the Court stated that according to Article 56 TFEU (ex Article 49 TEC, ex Article 59 EC Treaty), not only the elemination of all discrimination on the grounds of nationality is prohibited, but the Article also requires the abolition of any restriction, *”even if it applies without distinction to national providers of services and to those of other Member States, when it is liable to prohibit or otherwise impede the activities of a provider of services established in another Member State where he lawfully provides similar services”.* This wide interpretation of the notion ”restrictions” encompasses national rules. Restrictions are thus national rules that are not discriminatory but still caught by the bans in the Treaty because of the restrictive effects they may have for accessing the market in the Member State at issue. It is not just rules, but any public ”measure” that is caught by the ban on discrimination and restrictions.[21]

However, there are limits to the notion of ”restrictions”. Certain national rules have been held to fall outside the scope of Article 34 TFEU (ex Article 28 TEC) if their restrictive effect on trade between Member States is *”too uncertain or indirect”* to be caught by the ban.[22]

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[20] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd* [1991] ECR I-4221, para. 12.

[21] I can state this because normally it is national rules that are concerned.

[22] Case C-69/88 *H. Krantz GmbH & Co. v Ontvanger der Directe Belastingen and Netherlands State,* [1990] ECR I-583, Case C-93/92 *CMC Motorradcenter* [1993] ECR I-5009; Case C-379/92 *Peralta* [1994] ECR I-3453; Case C-44/98 *BASF* [1999] ECR I-6269. C.f. also Case *C-20/03 Burmanjer and Others* [2005] ECR I-4133 where the Court held that the national rules at issue, which made the itinerant sale of subscriptions to periodicals subject to prior authorisation, in any event had an effect over the marketing of products from other Member States that is too insignificant and uncertain to be regarded as being such as to hinder or otherwise interfere with trade between Member States.

In the field of free movement of goods, the ECJ felt in the beginning of the 1990-ies the need to limit the notion of restrictions. The ECJ did so in its judgment in the *Keck* case[23]. The *Keck* case continued with the principle set in *Cassis de Dijon*,[24] but in this case the ECJ found reason to narrow the practice. The Court limited the scope of the notion of restrictions regarding indistinctly applicable measures by adopting a differentiation. This differentiation was made between product requirements on one hand and certain selling arrangements on the other hand. So, certain selling arrangements do not fall under the scope of Article 34 TFEU (ex Article 28 TEC), provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and those from other Member States. The Court held that French rules prohibiting reselling at loss were not caught by Article 34 TFEU (ex Article 28 TEC) since they related merely to indistinctly applicable 'selling arrangements' having no adequate effect on intra-EU trade. This means that regulations such as regulating certain types of sales, for instance on advertising would not fall under Article 34 TFEU (ex Article 28 TEC).

However, the *Keck* case law does not apply in free movement of services.[25] This means that for instance rules on advertising come within the notion of restriction within free movement of services.[26]

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[23] Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[24] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649, see below.

[25] I.e. cases C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141 and joined cases C-34/95 *Konsumentombudsmannen v De Agostini (Svenska) Förlag* and C-35/95 and C-36/95 *Konsumentombudsmannen v TV-shop i Sverige AB* [1997] ECR I-3843.

2.5 Justification

As I mentioned before, the fact that a national rule is in principle caught by the bans of discrimination and restrictions does not necessarily mean that EU law outlaws the national rule; the rule may namely be justified. That means in short that EU law recognizes that the national rule seeks to attain a legitimite objective and that its restrictive effects do not go beyond what is necessary to attain that objective.

I shall now describe in more detail the justification test that national rules have to pass in order to be acceptable under EU law.

2.5.1 The legitimate objectives

I said before that the national rule has to seek to attain a legitimite objective. Another way to express this is to say that there has to be a valid justification ground for the national rule. The TFEU contains provisions on what are valid justification grounds. In case of freedom to provide services and the freedom of establishment the relevant provision, Article 52(1) TFEU (ex Article 46(1) TEC) reads:

"The provisions of the Chapter and measures taken in pursuance thereof shall not prejudice the applicability of provisions laid down by law, regulation or administrative action providing for special treatment for foreign nationals on grounds of public policy, public security or public health."

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[26] Joined cases C-34/95 *Konsumentombudsmannen v De Agostini (Svenska) Förlag* and C-35/95 and C-36/95 *Konsumentombudsmannen v TV-shop i Sverige AB* [1997] ECR I-3843.

According to the Treaty the valid justification grounds are thus public policy, public security and public health. The ECJ has consistently held that those grounds have to be interpreted narrowly.[27]

Thus, it can be seen that the Treaty originally set out a very limited number of justification grounds. However, in its case law the ECJ has continuously been expanding the number of justification grounds that can justify a national rule. This development in the case law has probably taken place against this background: The Treaty originally envisaged a limited notion of restrictions. Furthermore, and as I have set out above, the Treaty came into existence in the 1950-ies. At that time, a limited list of justification grounds was probably appropriate. However, afterwards national legal systems started giving attention to such interests as consumer protection and environmental protection and there was thus, in particular when the notion of restrictions was expanded, a need to recognize other justification grounds than the ones enumerated by the Treaty. The development in the case law can be exemplified by two cases in the area of free movement of goods.

2.5.2 Case Dassonville

The *Dassonville* case[28] concerned Belgian rules that banned the import of liquor without having an attached certificate of origin. The case dealt with the parallel import of liquor to Belgium and the dispute was whether strict requirements for origin labeling that were difficult for parallel importers to meet, broke the rules on quantitative restrictions on imports and measures having "*equivalent effect"*. The court held that Belgian legislation requiring the certificate of authenticity represented a measure having equivalent effect of restricting

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[27] See case C-205/89 *Commission of the European Communities v Hellenic Republic* [1991] ECR I-1361 para.9 and Opinion of Advocate General Ruiz-Jarabo Colomer in case C-358/95 *Tommaso Morellato v Unità sanitaria locale (USL) n. 11 di Pordenone* [1997] ECR I-1431, para. 21.

[28] Case C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville* [1974] ECR 837.

trade and in breach of Article 34 TFEU (ex Article 28 TEC). The ECJ stated that all trading rules enacted by Member States which are capable of *"hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."*[29] The key element here is that this provision shall apply to all national laws that prevent imports and exports between Member States, apart from customs duties and internal taxes, cf. Article 30 TFEU (ex Article 25 TEC) and 110 TFEU (ex Article 90 TEC) – 111 TFEU (ex Article 91 TEC). This formula was traditionally understood like it could include almost any national regulation.[30]

2.5.3 Case Cassis de Dijon

The *Cassis de Dijon* case[31] concerned provisions of the German alcohol monopoly law, which stated that all kind of certain liquor (both German and imported) that was sold in Germany had to contain at least 25% volume alcohol. This meant that the French black-currant liquor, Cassis de Dijon, which contained under 25% volume alcohol and was sold on the French market, could not be traded on the German market. The question was whether this was a legal restriction, i.e. "*measures having equivalent effect*". The ECJ stated that the limitation of the free movement of goods could be permitted in exceptional cases, for instance in order to protect the consumers or if another general public interest existed, although this was not foreseen by the Treaty.

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[29] Also known as the "Dassonville formula". See case C-8/74 *Procureur du Roi v Benoït and Gustave Dassonville* [1974] ECR 837, para. 5.

[30] See Barnard, Catherine *The Substantive Law of the EU. The Four Freedoms,* 2nd edition, Oxford University Press, 2007, p. 92, Oliver and Malcolm *Free movement of goods in the European Community,* 4th edition, Thomson, 2006, p. 102 and Prete, Luca *Of Motorcycle Trailers and Personal Watercrafts: the battle over Keck, I: Legal Issues of Economic Integration,* Vol. 35(2), 2008, p. 133-155.

[31] Case 120/78 *Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein* [1979] ECR 649.

Thus, Dassonville gave a wide definition of ”measures equivalent to quantitative restrictions”, i.e. restricions, and in turn Cassis de Dijon expanded the list of possible justification grounds. Case law afterwards has made clear that the ECJ is open to recognize a wide range of justification grounds so that by now, it must be assumed that the list of possible justification grounds is in principle open-ended.[32] What I mean by that is that the ECJ seems to be willing to recognize almost any objective that a national legislator may pursue as a valid justification ground.[33]

The interest that the ECJ have recognized are for instance (and I am limiting this enumeration to cases concerning the freedom to provide services): the effectiveness of fiscal supervision, the protection of public health, the fairness of commercial transactions, consumer protection, environmental protection, cultural policy, the protection of the working environment and the maintenance of public and social order.

2.6 The applicability of the legitimate objectives

Above I have set out that there are many possible justification grounds for a national rule. Now I must add that not all the grounds can be used in relation to all national rules caught

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[32] Ortino, Federico *Basic Legal Instruments for the Liberalisation of Trade: A Comparative Analysis of EC and WTO Law,* 2004 Hart Publishing, p. 394.

[33] There are, however, a limited number of exceptions. The ECJ has refused to recognize financial or economic considerations as a valid justification ground, unless the refusal could undermine the stability of the State’s social security system, see cases C-385/99 *V.G. Müller-Fauré v Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen* [2003] ECR I-4509*,* C-157/99 *B.S.M. Geraets-Smits v Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v Stichting CZ Groep Zorgverzekeringenor* [2001] ECR I-5473 and 176/84 *Commission of the European Communities v Hellenic Republic* [1987] ECR 1193.

by the bans in the Treaty. It follows namely from case law that the discriminatory rules can only be justified on the grounds stated in the Treaty, although the ECJ has been hesitant to find that the rules fulfill the proportionality test (see below).

On the other hand, national rules that are non-discriminatory but restrictive can be justified on all justification grounds, be it the ones in the Treaty or the ones recognised in case law. However, I must add some nuancing comments to this basic scheme of the applicability of the justification grounds. In the first place, I must mention that it seems that the ECJ is willing to accept environmental protection as a valid ground for discriminatory national rules although environmental protection is not listed in the Treaty as a valid justification ground.[34]

In the second place, some comments have to be made concerning national rules that are indirectly discriminary. Or put in another way: Do such rules fall within the category of discriminatory rules that can only be justified on the basis of the grounds established by the Treaty or do they fall within the group of restrictions that can be justified both on the grounds in the Treaty and the ones established by case law?

The answer seems to be that indirectly discriminatory measures fall within the category of restrictions, i.e. they can be justified both on the grounds given in the Treaty and on those developed in case law.[35] The following cases support this view: The *Clean car* case[36] con-

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[34] Cases C-2/90 *Commission of the European Communities v Kingdom of Belgium* [1992] I-4431 paras. 34-36 and C-379/98 *PreussenElektra AG v Schhleswag AG, in the presence of Windpark Reußenköge III GmbH and Land Schleswig-Holstein* [2001] ECR I-2099, paras. 75 - 76.

[35] Broberg and Holst-Christensen *EU-domme med bemærkninger og spørgsmål,* Jurist-og Økonomforbundets Forlag, 2009, 5th edition, p. 686.

cerned national legislation that required legal persons to appoint as manager a person residing in the country. The Court stated in para. 30 that a requirement that nationals of the other Member States must reside in the State concerned in order to be appointed managers of undertakings is *"therefore such as to constitute indirect discrimination based on nationality, contrary to Article 48(2) of the Treaty*[37]*"*.The ECJ concluded that it would be otherwise only if *"the imposition of such a residence requirement were based on objective considerations independent of the nationality of the employees concerned and proportionate to a legitimate aim pursued by the national law"*.[38]

In *Schöning-kougebetopolou*[39] the question the Court had to consider was *"whether a clause of a collective agreement applicable to the public service of a Member State is such as to infringe the principle of non-discrimination laid down in Article 48 of the Treaty"* and also *"whether such rules are justified by objective considerations independent of the nationality of the emplyees conerned and whether they are porportionate to the legitimate aim of the national provisions"*.[40] The Court held that a provision of a collective agreement defining the conditions for promotion of public service employees, which did not take any account of previous periods of comparable employment completed in the public service of another Member State, infringed the principle of non-discrimination.

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[36] Case C-350/96 *Clean Car Autoservice GesmbH v Landeshauptmann von Wien* [1998] ECR I-2521.

[37] Now Article 54(2) TFEU (my footnote).

[38] Case C-350/96 *Clean Car Autoservice GesmbH v Landeshauptmann von Wien* [1998] ECR I-2521, para. 31.

[39] Case C-15/96 *Kalliope Schöning-Kougebetopoulou and Freie und Hansestadt Hamburg* [1998] ECR I-47.

[40] Case C-15/96 *Kalliope Schöning-Kougebetopoulou and Freie und Hansestadt Hamburg* [1998] ECR I-47, para. 21.

The Court treated the national rules as indirect discrimination and went on to examine justification grounds not mentioned in the Treaty.

2.7 Proportionality

The principle of proportionality consists of two elements: *suitability* and *necessity*. Suitability means whether the measure at issue is suitable or appropriate to achieve the objective it pursues. Necessity means whether there exists an alternative measure which is less restrictive than the measure in question and which is (at least) equally effective in achieving the pursued objective.

A national rule must comply with the principle of proportionality in order to be acceptable under EU law.

2.8 Summarising

According to the Treaty, in assessing whether a national rule constitues an unlawful restriction on freedom to provide services after Article 56 TFEU (ex Article 49 TEC), one must carry out an evaluation in stages. First it must be ascertained whether the measure under consideration is a restriction in the provisions sense. If this is the case, it must be considered whether the restriction is based on a valid legitimate ground. If that is the case, it must be considered whether the national rule is in accordance with the principle of proportionality. That means that it has to be examined if it is suitable and necessary for reaching the legitimate objective that it seeks to attain. The requirement of *necessity* means that the restriction should not only be necessary to the interest it seeks to protect, but also not already be adequately protected by the legislation of another Member State.[41]

2.9 Further clarifications

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[41] Bull, Henrik *Det indre marked for tjenester og kapital,* Universitetsforlaget 2002, p.620.

Above I have described in general the restriction and the justification test that national rules have to undergo on the basis of the TFEU´s provisions on free movement and in particular the freedom to provide services. I think that the description gives an appropriate overall understanding of the state of law. Before I enter to the examination of the Services Directive, there are some matters that should be further clarified.

In the first place, I have referred simply to ”national rules” above as the rules that are the object of the Treaty provisions on free movement, without clarifying what national rules are meant under the provisions. The national rules caught by the prohibitions on discrimination and restrictions are primarily rules issued by the State, regional authorities, and any public body. In addition, the ECJ has held that some national rules that in the national legal orders are considered as ruled of private law fall within the scope of the Treaty provisions.[42]

In the second place, I should clarify what are meant by ’services’ within the understanding of the Treaty. Under Article 57 TFEU (ex Article 50 TEC) , services shall be considered as such *”where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons”*.

2.10 Concluding on the state of law before the Services Directive

Under the case law under the Treaty, the number of justification grounds has expanded, i.e. the widening of Article 56 TFEU (ex Article 49 TEC). The Court has made sure that

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[42] See cases C-31/76 *Donà v Mantero* [1976] ECR 1333, C-36/74 *Walrave and Koch v union Cycliste Internationale* [1974] ECR 1405, C-415/93 *Union royale Belge des sociétés de football association ASBL v Jean-Marc Bosman* [1995] ECR I-4921, C-438/05 *International Transport Worker´s Federation and Finnish Seamen´s Union v Viking Line ABP and OÜ Viking Line Eesti* [2007] I-10779 and C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet and Others* [2007] ECR I-11767.

nothing escapes its reach and at the same time also ensured that it did not have to strike down measures it approves of.

I shall now examine whether the Services Directive alters the state of law that I have described. I find it useful to first give an overview of the Directive, and thereafter examine the particular provisions concerning freedom to provide services.

3 The Directive on services in the internal market

3.1 Background to the Services Directive

The Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market (SD) was adopted on 12 December 2006. The purpose of the Directive is to establish a genuine internal market for services by removing legal and administrative barriers to the exchange of services in EU countries. The Directive is meant to make it easier for companies to establish themselves in Member States and to sell services across borders. The Directive covers all 27 EU Member States together with the three EFTA States: Iceland, Liechtenstein and Norway.[43] The services include both the right to freedom of establishment in other Member States and free exchange of services. The Directive also has some detailed rules for administrative simplification and cooperation between Member States.

3.2 Scope

The Services Directive is a general directive and is therefore applicable to all services, unless they are explicitly exempted from the Directive's scope.[44] When it comes to the question of what should be considered a *'service'* in the meaning of the Directive, the Di-

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[43] Switzerland is not adopting legislation intended to parallel the Services Directive.

[44] The European Commission *Handbook on the implementation of the Services Directive,* 2007*,* chapter 2.1.1 p. 10.

rective in Article 4(1) explains that *'service'* means *"any self-employed economic activity, normally provided for remuneration, as referred to in Article 50 of the Treaty"*.

The following examples of services fall within the Directive´s scope: Legal and financial services, real estate services, construction services, architectural services, car rental, travel agency and tour guide services, recreational services provided by sports centers and amusement parks. In addition, certain household support is included - such as help for the elderly.[45]

The Services Directive excludes third-country nationals from its definition of *'provider'*[46] and excludes many third-country nationals from its definition of *'recipient'*.[47]

The Directive is not a harmonisation directive in the sense that it harmonizes the material rules with which a specific provision of services has to comply.[48]

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[45] See Recital 33 in the Directive's Preamble and Article 2(2)(b) of the Directive.

[46] Article 4(2): "*'provider'* means any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service."

[47] Article 4(3): "*recipient* means any natural person who is national of a Member State or who benefits from rights conferred upon him by community acts, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who, for professional or non-professional purposes, uses, or wishes to use, a service". See the reference in Nergaard, Nielsen and Roseberry *The Services Directive – Consequences for the Welfare state and the European Social Model*, 2008, p.121.

[48] Hatzopoulos, Vassilis has stated in *Regulating Services in the European Union*, Oxford: Oxford University Press, 2012, p. 168 that the Directive *"is more about coordination and the exchange of information than about harmonization. Even where harmonization does occur, it remains minimal and concerns elements peripheral to service provision"*.

3.3 The objectives of the Services Directive

The Services Directive establishes a general legal framework to make it easier for service providers to make use of the freedom of establishment and to facilitate the free movement of services, while manitaining a high quality of services.[49] The elimination of obstacles will give both the providers and the recipients of services the legal certainty they need to exercise the two fundamental freedoms, the freedom of establishment and the free movement of services, enshrined in the Treaty. The aim of the Directive is, to a large extent, to codify existing rules concerning trade in services, as they have developed in the case law of the Court of Justice. The Preamble of the Services Directive sets in Recital 1 that the objectives of the Directive is *"seeking to forge ever closer links between the States and peoples of Europe and to ensure economic and social progress. In accordance with Article 14(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of services is ensured."* It goes on to say that the*"the elimination of barriers to the freedom of establishment for providers in the Member States and to the free provision of services between Member States"* in Recital 116.

The Services Directive has four main objectives; 1. To strenghten the freedom of establishment and the freedom to provide services in the EU area, 2. To strengthen consumer rights, 3. To improve the quality of services and 4. To establish an effective administrative cooperation between Member States. The Directive applies to services, but it does not apply to goods. The services include services provided in a Member State of service provider established in a Member State, i.e. the Services Directive Article 2. From this rule applies, however, several more or less clear exceptions. Among the services which are clearly excluded from the Services Directive are the services that are covered by other directives, see the Services Directive Article 1(3). This includes financial services, electronic

[49] The Services Directive Article 1.

communications and transportation (including port services), where services are regulated under separate directives. This allows the Services Directive to act as a sort of "residual Directive" which applies to the services not covered by other directives. In addition to the services covered by other directives, the following services exempt from the Directive: non-economic services of general interest, temporary employment services, health services, audiovisual services, gambling services, services related to the exercise of official authority, social services relating to social housing, childcare, support to families and individuals, private security services as well as services offered by notaries and bailiffs.[50]

The Services Directive contains provisions that deal with a wide range of issues related to free movement. The provisions of the Directive are divided into seven chapters. Chapter I contains general provisions concerning the Directive, its scope, its relation to other provisions of EU law and the definitions used in the Directive. Chapter II contains provisions for administrative simplification, including provisions on simplification of various procedures, national focal points (so-called "points of single contact"), electronic procedures and the right to information. Chapter III deals with the right of establishment for service providers, while the provisions of Chapter IV governs the free movement of services. Chapter V sets out certain rules regarding service quality. Chapter VI of the Directive contains rules on administrative cooperation and Chapter VII contains provisions relating to the implementation of the directive.

The Treaty, as it is interpreted in case law, will in many fields still remain the only source of law, because of the exclusion of matters and areas from the remit of the Directive or Article 16 thereof and the lack of comprehensive sectoral Community legislation.[51] In some

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[50] See Article 2(2) and Recital 27.

[51] Further, the Court has a major role to play in clarifying the requirements of many of the sector-specific directives, due to the use of nebulous concepts such as *"general good"*. See Tison, Michel *Unravelling the general good exception: the case of financial services"* pub-

areas the Services Directive is unclear, both for its scope and how the provisions should be understood. This applies in particular to Article 16. The majority of commentators accept that the establishment provisions in Chapter III of the Directive broadly endorse – and arguably legitimize – the Court's case law and so are largely uncontroversial. The same cannot be said of Chapter IV on the free movement of services.[52] The Directive distinguishes between the freedom to provide services and the freedom to receive services. Both need to be distinguished from the rules on establishment. While the establishment provisions are inteded for those who are "permanently" established in another Member State, the service provisions *"apply to those who are temporarily providing a service in another Member State either remotely (for example, over the Internet) or by operating temporarily in another country, without "establishing themselves there permanently."*[53]

The Chapter IV of the Services Directive concerns free movement of services; Article 16 about Freedom to provide services, Article 17 about Additional derogations from the freedom to provide services and Article 18 about case-by-case derogations. The "additional derogations" in Article 17 concern matters such as services of general economic interest in the utility sector[54] and judicial recovery of debts[55] as well as matters covered by specific

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lished in Andenæs and Roth (eds) *Services and Free Movement in EU Law,* Oxford University Press, 2002, p. 321 – 381. See the reference in Neergaard, Nielsen and Roseberry *The Services Directive – Consequences for the Welfare State and the European Sosial Model,* 2008, p.197.

[52] Barnard, Catherine *Unravelling the Services Directive* CMLRev 45, 2008, p.359.

[53] Barnard, Catherine *Unravelling the Services Directive*, CMLRev, 45, 2008, p.359 ff. See for instance case C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165 paras. 25-27.

[54] The Directive gives a non-exhaustive list of instances, which is narrowed down by Recital 70 in the Preamble. See also Recitals 84 and 90.

[55] See also Recital 85.

Community measures, including the Posted Workers Directive 96/71,[56] the Data Protection Directive 95/46, the Lawyer´s Directive 77/249, Title II of the Professional Qualifications Directive 2005/36 and the Citizen´s Rights Directive. The "case-by-case" derogations in Article 18 apply *"in exceptional circumstances only"*, i.e. Recital 91.

In accordance with Articles 49 TFEU (ex Article 43 TEC) and 56 (ex Article 49 TEC), the Services Directive *"clearly distinguishes between the rules applicable to establishment and those applicable to cross-border service provision".*[57] It is important to understand the difference between establishment and cross-border service provision. Establishment involves the actual pursuit of an economic activity through a fixed establishment for an indefinite period.[58] On the other hand we find the freedom to provide services,[59] which is, according to the ECJ case law, characterised by the absence of a stable and continuous participation in the economic life of the host Member State.[60] The ECJ has constantly held that the distinction between establishment and provision of services needs to be made on a case-by-case basis, taking into account not only the *duration* but also the *regularity, periodicity and*

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[56] This is probably unnecessary given the exclusion in Article 3(1)(a). See also Recitals 86 and 87.

[57] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.36, chapter 7.1.1.

[58] Case C-221/89 *The Queen v Secretary of State for Transport, ex parte Factortame Ltd and others* [1991]ECR I-3905, para. 20. See also the definition of *"establishment"* in Article 4(5) of the Services Directive.

[59] Article 4(1) of the Directive defines a*"service"* as *"any self-employed economic activity, normally provided for remuneration"*, as referred to in Article 57 of the TFEU (ex Article 50 TEC).

[60] Case C-131/01 *Commission of the European Communities v Italian Republic* [2003] ECR I-1660, para. 23.

continuity of the provision of services.[61] While the establishment provisions of the Directive are aimed at those who are *"permanently"* established in another Member State, the services provisions apply to those who are temporarily providing a service in another Member State. Article 16 applies for *"the freedom to provide cross-border services without unjustified restrictions. It is one of the cornerstones of the Services Directive. It applies to all services falling within the scope of application of the Directive, with the exception of those services or matters listed in Article 17".*[62]

Chapter IV of the Directive deals with free movement of services and consists of two sections, the first covers freedom to provide services and related derogations and the second covers rights of recipients of services. Chapter IV distinguishes between freedom to provide services and freedom to receive services. Both need to be distinguished from the rules on establishment. In its original proposal, the scheme of Article 16 (which was entitled 'Country of origin principle') was that providers were to rely on the rules of their home Member State in the access to and exercise of a service activity. The home Member State was to be responsible for supervising the provider and services provided by him, including those services provided by him in another Member State. The Parliament changed the title *'Country of origin principle'* to *'Freedom to provide services'*, because the requirement was too much for some Member States, who worried that service providers from the newer Member States would be able to undermine those established in older States, where requirements can be much more rigorous.

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[61] Cases C-55/94 *Reinhard Gebhard v Consiglio dell'Ordine degli Avvocati e Procuratori di Milano* [1995] ECR I-4165, para. 39 and C-215/01 *Proceedings against Schnitzer* [2003] ECR I-14847, para. 28.

[62] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.36, chapter 7.1.2.

In the previous sections I have illustrated the case law on the Treaty provisions on free movement of services. It has been shown that case law operates with a wide notion of restrictions and, correspondingly, an immense catalogue of possible public interests for justifying that such restrictions are available for Member States. I have also given a general overview of the Services Directive.

My attention now turns to the free movement of services in the Services Directive Chapter IV. The crucial provision on restrictions and public interests that may justify such is Article 16. The provision is to be found in Chapter IV of the Directive under Section I "Freedom to provide services and related derogations". The other provisions in that section are Articles 17 and 18. Article 17 deals with "Additional derogations from the freedom to provide services" and Article 18 deals with "Case-by-case derogations". Neither of these two provisions is relevant to the main object of this paper, i.e. whether the Directive alters the state of law on justifiable restrictions to the free movement of services.

Focus is hence on Article 16, and the first question to address is: What are the contents of the provision? In other words, how should it be interpreted? Section 4 below deals with this question and it concludes that Article 16 has indeed altered the state of law. Given that conclusion, it is appropriate to address the question whether that alteration of the law will and should work. Section 5 deals with that question.

4 Interpretation of Article 16

Article 16 provides:

1. Member States shall respect the right to provide services in a Member State other than that in which they are established.

The Member State in which the service is provided shall ensure free access to and free exercise of a service activity within its territory.

Member States shall not make access to or exercise of a service activity in their territory subject to compliance with any requirements which do not respect the following principles:

(a) non-discrimination: the requirement may be neither directly nor indirectly discriminatory with regard to the Member State in which they are established;
(b) necessity: the requirement must be justified for reasons of public policy, public security, public health or the protection of the environment;
(c) proportionality; the requirement must be suitable for attaining the objective pursued, and must not go beyond what is necessary to attain that objective.

2. Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements:

(a) an obligation on the provider to have an establishment in their territory;
(b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law;
(c) a ban on the provider setting up a certain for or type of infrastructure in their territory, including an office or champbers, which the provider needs in order to supply the services in question;
(d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-empoyed;
(e) an oobligation on the provider to possess an identity document issued by its competent autorities specific to the exercise of a service activity;
(f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided;
(g) restrictions on the freedom to provide services referred to in Article 19.

3. The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the provision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules employment conditions, including those laid down in collective agreements.

4. By 28 December 2011 the Commission shall, after consultation of the Member States and the social partners at Community level, submit to the European Parliament and the Council a report on the application of this Article, in which it shall consider the need to propose harmonisation measures regarding service activities covered by this Directive.

As can be seen, Article 16 is divided into four paragraphs, of which the last one is not relevant for the examination here. I will examine the others, one by one. As concerns the first paragraph I hold that there are three issues to discuss, namely:

- Which are the requirements that Article 16 contemplates?
- The discrimination/non-discriminatory nature of those requirements.
- The public interests that may justify requirements.

I will mention that according to the Services Directive, measures justified by those four grounds still need to meet the proportionality test, which, in my opinion, seems to be in accordance with the Treaty, so in this area there seems to be nothing new. The proportionality test means that the application of the requirement must be appropriate to secure the attainment of the objective, which it pursues and must not go beyond what is necessary to attain it.[63]

I will also add that even though the exceptions have been narrowed, many still remain because of certain areas which are *"not affected"* by the Directive, according to Article 1.

4.1 Article 16(1)

4.1.1 Requirements

Let me first note that Article 16(1) provides that a Member State *"shall ensure free access to and free exercise of a service activity within its territory"*. The wording *"free access and free exercise"* is wide and it seems to echo the Treaty's provision that there should be no restrictions on the freedom to provide services. The wide nature of the freedom seems to be underlined by the spelling out of the two components *"access"* and *"exercise"*, meaning that there should be no obstacles to accessing the market in the Member State and there should be no obstacles to operating on the market in the Member State. It is with this wide

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[63] Case C-76/90 *Manfred Säger v Dennemeyer & Co. Ltd,* para. 15, joined cases C-369/96 and C-376/96 *Arblade and Others*, case C-58/98 *Corsten* para. 39 and case C-390/99 *Canal Satélite* para. 33.

freedom that the Member States cannot in principle interfere through imposing requirements.

"Requirements" are defined in Article 4(7) of the Directive as *"any obligation, prohibition, condition or limit provided for in the laws, regulations or administrative provisions of the Member States or in consequence of case-law, administrative practice, the rules of professional bodies, or the collective rules of professional organisations, adopted in the exercise of their legal autonomy; rules laid down in collective agreements negiotiated by the social partners shall not as such be seen as requirements within the meaning of this Directive".* The definition must be read in light of the explanation given in the preamble. Recital 9 states that the Directive only applies to *"requirements which affect the access to, or the exercise of, a service activity. Therefore, it does not apply to requirements, such as road traffic rules, rules concerning the development or use of land, town and country planning, building standards as well as administrative penalties imposed for non-compliance with such rules which do not specifically regulate or specifically affect the service activity but have to be respected by providers in the course of carrying out their economic activity in the same way as by individuals acting in their private capacity".*

Catherine Barnard raises the question whether the Directive is intended to remove only discriminatory restrictions (the discrimination model) or if it goes further and also covers non-discriminatory restrictions which impede market access and the exercise of the freedom to provide services (the so-called "market access" or "restrictions" model).[64] Barnard considers that the Services Directive is not clear to which model applies, but she concludes that it must be the "market access" model that applies. I agree with her conclusion. Article 4(7) does not require a national rule to be discriminatory in order to fall under the notion of requirement. Article 16 does not either state such a condition.

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[64] Barnard, Catherine *Unravelling the Services Directive,* CMLRev 45, 2008, p.339.

Prima facie the definition would appear to be in accordance with case law´s determination of *"restrictions"*; for instance, and as shown earlier in the previous section(s), certain private measures fall within the notion of restrictions and so do they under the Directive´s notion of requirements. However, there are differences from the case law. In the first place, case law has always held that it is the effect of a national rule that matters for determining whether the rule amounts to a restriction. Recital 9, second sentence, on the other hand, seems to give importance to the subject matter of the rule, no matter whether the rule has a restrictive effect.

Catherine Barnard, however, states that the definition of *"requirement"* was intended to give the Services Directive the *"widest possible reach".*[65] She finds that for the overzealous, *"it will catch rules never intended to be covered by Community Law."*[66] To me, that statement does not seem right. I cannot see that the notion of "requirements" must necessarily be wider than "restrictions". Catherine Barnard also compares the situation with the *Keck* case,[67] because the ECJ will have to *"define a rule that weeds out the unmeritorious claims while leaving the door open to genuine claims."* This is not easy and *"the second sentence of 9th Recital suffers from similar shortcomings as to the "certain selling agreement" formula in Keck"*[68] I think that she is probably right in this last view; a test on whether a national rule also applies to private persons can probably be difficult to carry out, and it is not entirely clear to me for which reasons a service provider should not be able to

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[65] Barnard, Catherine *Unravelling the Services Directive*, CMLRev 45, 2008, p.336.

[66] Barnard, Catherine *Unravelling the Services Directive*, CMLRev 45, 2008, p.336.

[67] Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

[68] Barnard, Catherine *Unravelling the Services Directive*, CMLREV 45, 2008, p.337.

oppose a discriminatory building standard under the Directive simply for the reason that the standard also applies to private parties, building their own house.[69]

The European Commission's *Handbook on the implementation of the Services Directive* explains the notion of requirements in these words:[70] *"Article 16 requires Member States to abstain from imposing their own requirements on incoming service providers except where justified by the four reasons enumerated in Article 16(1) and (3). This means that the requirements Member States can impose on in-coming service providers are limited. This applies to any form of requirement, regardless of the type or level of the legislation in question or the territorial limits within which a national rule applies. As a result, service providers will know that they will not be subject to the legislation of the receiving Member State except where its application is justified for the four reasons set out in Article 16(1) and 16(3) (or the legislation in question is covered by a derogation provided for in Article 17)."*[71]

To me it seems that the Commission may be trying to distance itself from Recital 9, second sentence, which gives importance to the type of legislation in question. As Recital 9 is just that – I mean a statement without binding effect – I believe that the ECJ may very well understand Article 4(7) in accordance with its existing case law. That is that national rules will be considered as "requirements" under the Directive, unless their effects on service providers from other Member States are too uncertain or indirect.

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[69] The service provider would in such a case then have to rely on the Treaty in order to challenge the national rule.

[70] The underlining is made by me.

[71] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.36, chapter 7.1.2.

Conclusion: In my opinion, the notion of requirements seems to cover the notion of restrictions.

I shall now discuss Article 16´s requirement that national requirements must not be discriminatory.

4.1.2 The discriminatory/non-discriminatory nature of the requirements

Article 16(1) states:

"the requirement may be neither directly nor indirectly discriminatory with regard to nationality or, in the case of legal persons, with regard to the Member State in which they are established;".

The Treaty based derogations are public policy, public security and public health. As will be shown below, these derogations also apply under the Directive, which adds one more derogation, namely environment protection. Thus, while the Treaty allows the three derogations to apply to discriminatory restriction, Article 16(1) completely bans any discriminatory requirement from justification. Therefore, in my opinion, Article 16(1) implies a limitation relative to the existing case law. However, I must add that this change may have only limited importance in practice, as discriminatory requirements will often fail the proportionality test.

There is however, one more remark to be made in relation to the prohibition of any discriminatory requirement. My remark concerns indirect discrimination. Earlier I showed that the ECJ basically deals with indirect discrimination as with non-discriminatory restrictions. That is in respect of indirect discrimination, both the Treaty-based derogations and the justification grounds developed in case law apply. I am not sure that Article 16 will allow that practice to stand.

Conclusion: I find that there is a deviation from the case law, where it is settled that discriminatory rules may be justified on the basis of the interests enumerated in the Treaty. In my opinion, Article 16 seems to exclude that.

I shall discuss the third issue that I find interesting to interpret in Article 16, and that is the list of justification grounds.

4.1.3 Justification grounds

The application of national requirements in Article 16 can only be justified if necessary for the protection of *"public policy, public security, public health or the protection of the environment.*[72] The list of justification grounds is similar to the one in Article 52 TFEU (ex Article 46 TEC), but, as I have mentioned earlier, there has been added one additional exception; *"the protection of the environment"*. In the Services Directive Article 16(1), the legislator has intentionally limited the number of justification grounds to enhance free movement. The Directive departs from the Court created principle of *'overriding public interest'* in connection with the services that are regulated by the Directive. This follows from the wording of the Article, and is particularly clearly demonstrated by a comparison with the wording of provisions in the Directive concerning freedom of establishment.[73] Article 16 does not mention other considerations and therefore abolishes the ability of Member States to legitimize national requirements for service providers with reference to the doctrine of *'overriding public interest'*.

Article 16(1) on this point thus implies a mayor departure from case law. One can say that the Directive is close to the original Treaty: There are only a very limited number of justifi-

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[72] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.37, chapter 7.1.3.1.

[73] See for instance the formulation in Article 15(3)(b) where *necessity* is justification *"by an overriding reason to the public interest"*.

cation grounds. The Directive makes the limitation although it applies to a wide variety of national rules that are not specified more in detail. The implication of this is that it becomes very important in an individual case to decide if the reasons for a national requirement fall within the listed number of justification grounds. If the answer is negative, the national requirement is contrary to Article 16 and there will be no need to examine whether the further conditions for justification, i.e. proportionality, are fulfilled.

Because of the limitation of the number of justification one may wonder if the grounds listed in Article 16(1) shall be interpreted widely. Here I find that one must mention Article 4(8) of the Directive. Article 4(8) defines the term *'overriding reasons related to the public interest'* which is the term that the Directive uses to refer to both the justification grounds in the Treaty and those developed (or to be developed) in case law. The definition is relevant in the context of the Directive's provisions on freedom of establishment, which allow requirements to be justified for *'overriding reasons related to the public interest'*.

Article 4(8) states (the underlining is made by me):

"'overriding reasons relating to the public interest' means reasons recognised as such in the case law of the Court of Justice, including the following grounds: public policy; public security; public safety; public health; preserving the financial equilibrium of the social security system; the protection of consumers, recipients of services and workers; fairness of trade transactions; combating fraud; the protection of the environment and the urban environment; the health of animals; intellectual property; the conservation for the national historic and artistic heritage; social policy objectives and cultural policy objectives".

Recital 40 in the Preamble is relevant to Article 4(8) and it states (the underlining is made by me):

"overriding reasons relating to the public interest...has been developed by the Court of Justice in its case law in relation to Articles 43 and 49 of the Treaty and may continue to

evolve. The notion as recognized in the case law of the Court of Justice covers at least the following grounds: public policy, public security and public health, within the meaning of Articles 46 and 55 of the Treaty; the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy."

As can be seen, the four grounds listed in Article 16(1) are also mentioned in Article 4(8). At the outset I will therefore think that the other grounds listed in Article 4(8) cannot be used to justify a requirement under Article 16. The list of justification grounds in Recital 4 that are different from the four mentioned in Article 16, is even longer. Those grounds cannot therefore be used for justifying a requirement under Article 16.

In its *Handbook on the implementation of the Services Directive*,[74] the Commission also makes clear that other justification grounds than the four mentioned in Article 16 cannot be used to justify national requirements: *"According to Article 16 application of national requirements can only be justified if necessary for the protection of public policy, public se-*

[74] The European Commission *Handbook on the implementation of the Services Directive,* 2007.

curity and public health or the environment. This excludes Member States from invoking other public interest objectives".[75]

It should be noted that the terms "public policy", "public security" and "public health" are concepts of Community law, which stem directly from Article 46 of the EC Treaty. These concepts have been consistently interpreted by the ECJ in a narrow sense, meaning that there must be a genuine and serious threat to a fundamental interest of society and it is for the Member State invoking these public interest objectives to demonstrate the risks involved.[76] *The ECJ has also clearly indicated that Member States cannot unilaterally determine their scope: "... the concept of "public policy" in the Community context, and where, in particular, it is used as a justification for derogating from a fundamental principle of Community law, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions.*[77] *It also results from the case law that the aim of protecting these public interest objectives does not allow Member States to exempt entire economic sectors or professions from the fundamental freedoms, and in particular the freedom to provide services.*[78]

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[75] Leaving aside the case-by-case derogation provided for in Article 18.

[76] As regards public policy see case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I-9609, as regards public policy and public security see case C-54/99 *Église de Scientologie de Paris v Prime* Minister [2000] ECR I-1335, para. 17. Concerning public security and public health see Case C-257/05 *Commission v Germany* [2006] I-134, para. 25.

[77] Case 41/74 *Van Duyn* [1974], para. 18 with regard to the free movement of workers; see also Case 30/77 *Bouchereau* [1977], para. 33.

[78] Case C-355/98 *Commission of the European Communities v Kingdom of Belgium* [2000] ECR I‑1221. See the European Commission *Handbook on the implementation of the Services Directive,* 2007, p.37, chapter 7.1.3.1.

The opinion expressed in the *Handbook on the implementation of the Services Directive* clearly favours that at least three of the four justification grounds in Article 16 must be interpreted narrowly. That must mean to me that they shall not be interpreted so that they include other justification grounds.

On the other hand, there are some indications that the interpretation may not be that narrow, that is that some of the overriding reasons in the public interest may be, at least partly, covered by the limited list of justification grounds in Article 16.

In the first place, I would like to mention recital 41. The recital concerns mainly the notion of *'public policy'* and states (I have made the underlining):

"the concept of public policy, as interpreted by the Court of Justice, covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare. Similarly, the concept of public security includes issues of public safety."

As can be seen, *'animal welfare'* is included in public policy. On the other hand, the Recital just before – and that I quoted earlier – mentions *'animal welfare'* as a separate ground different from public policy. This seems to show that public policy could be interpreted wider in the Directive as it has been done in the case law.

In the second place, a difference between Recital 40 and Article 4(8) must be mentioned. Article 4(8) does not refer to public policy, public security and public health *"within the meaning of Articles 46 and 55 of the Treaty"* while recital 40 makes the link to the Treaty. It would be normal to interpret Article 4(8) on the basis of Recital 40. However, the missing link to the Treaty in Article 4(8) may give the ECJ the basis for having a different interpretation of the three notions mentioned in the context of the Directive. This missing link may also explain the different length of the lists of justification grounds in Article 4(8) and

Recital 40: For instance, *'the sound administration of justice'* is mentioned in Recital 40 as a separate justification ground but it is not mentioned in Article 4(8). Could it be that the reason is that in Article 4(8) the *'sound administration of justice'* is considered to be part of public policy?

I shall here mention the advisory opinion that the EFTA Court gave in the *Pucher* case[79]. The case concerned a residence requirement for board members of companies in Liechtenstein and the EFTA Court stated that the requirement was a restriction to the freedom of establishment.[80] The EFTA Court then had to examine if the requirement could be justified. The government of Liechtenstein argued that the requirement was needed for the functioning and good reputation of the financial services sector and the administration of justice. The EFTA Court examined in detail the arguments on the basis of Article 33 EEA, which is the equivalent to Article 52 TFEU (ex Article 46 TEC) and concluded that the requirement could not *"be justified on grounds of public policy and/or public security within the meaning of Article 33 EEA".*[81] The advisory opinion is different from the approach that the ECJ took in *Alpine Investments.*[82] There the ECJ stated that the *"good reputation of the financial sector"* was *"an imperative reason of public interest"* without referring to the notion of public policy in the Treaty. The advisory opinion of the EFTA Court may give some reason to believe that *'public policy'* in Article 16 of the Directive can be interpreted more broadly than what has been the case until now as concerns *'public policy'* in Article 52 TFEU (ex Article 46 TEC).

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[79] Case E-2/01, *Dr Franz Martin Pucher* (2001/C 242/08).

[80] Case E-2/01, *Dr Franz Martin Pucher* (2001/C 242/08), para. 26.

[81] Case E-2/01, *Dr Franz Martin Pucher* (2001/C 242/08), para. 46.

[82] Case C-384/93 *Alpine Investment BV v Minister van Financiën* [1995] ECR I-1141.

In the third place, I would like to mention that *'consumer protection'* which is a recognised justification ground in case law,[83] is not mentioned in Article 16. However, some part of consumer protection may fall under *'public policy'* when Recital 41 states that public policy also covers the *'protection of minors and vulnerable adults'*.

Weatherhill states that "*where consumer safety issues are at stake, host state intervention is envisaged by Article 16 (see also Article 18), but where the protection of the economic interests of consumers is the aim of the host state, it seems that the intervention would be precluded by the Directive, if adopted – unless 'public policy' in Article 16 is stretched to embrace concern for the economic interests of consumers (which the Court has emphatically not been prepared to sanction in the interpretation of the Treaty provisions on free movement)".*[84]

In the fourth place, Recital 41's statement about *'public security'* should be mentioned. In case law, public security is a concept, which requires the existence of *a genuine and serious threat to a fundamental interest of society* (which is also the case of public policy). There are several examples of what the ECJ has recognised as public security objectives;[85] for instance the aim of a Member State to ensure the availability of crude oil, because of *"the fundamental importance for a country's existence, since not only its economy but above all its institutions, its essential public services and even the survival of its inhabitants*

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[83] Joined cases C-34/95 *Konsumentombudsmannen v De Agostini (Svenska) Förlag* and C-35/95 and C-36/95 *Konsumentombudsmannen v TV-shop i Sverige AB* [1997] ECR I-3843.

[84] Weatherill, Stephen *Promoting the Consumer Interest in an Integrated Services Market* Europa Insitute, Mitchell Working Paper Series 1/2007, p.7.

[85] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.38.

depend upon (it)"[86] Recital 41 states that public security includes public safety. Public safety is not defined in the Directive and I am not aware of case law that describes what it means as a justification ground. The Commission's *Handbook on the Implementation of the Services Directive*[87] does not either give explanations on the term. However, it seems to me that the term *'safety'* refers to something different from genuine and serious threats to the fundamental interests of society.

When I have to conclude on this, my opinion is that there are indeed indications that the limited list of justification grounds in Article 16 may be interpreted more broadly than what has been the case until now.

My overall conclusion concerning Article 16's justification grounds is therefore that the Article surely changes the state of law in that it limits the number of justification grounds. It is more difficult to say how wide that change will be in practice as the grounds may to some extent be interpreted so that they cover matters that were not covered until now.

I shall now discuss Article 16(2) and (3).

4.2 Articles 16(2) and (3)

4.2.1 In general

Article 16(2) states that *Member States may not restrict the freedom to provide services in the case of a provider established in another Member State by imposing any of the following requirements".* The Article goes on to list seven requirements: *"a) an obligation on the*

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[86] Case C-72/83 *Campus Oil Limited and others v Minister for Industry and Energy and others* [1984] ECR 2727, para. 34.

[87] The European Commission *Handbook on the implementation of the Services Directive,* 2007.

provider to have an establishment in their territory; b) an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their territory, except where provided for in this Directive or other instruments of Community law; c) a ban on the provider setting up a certain form or type of infrastructure in their territory, including an office or chambers, which the provider need in order to supply the service in question; d) the application of specific contractual arrangements between the provider and the recipient which prevent or restrict service provision by the self-employed; e) an obligation on the provider to possess an identity document issued its competent authorities specific to the exercise of a service activity; f) requirements, except for those necessary for health and safety at work, which affect the use of equipment and material which are an integral part of the service provided; g) restrictions on the freedom to provide the services referred to in Article 19.

On its wording the ban in Article 16(2) seems to be absolute; that is that the kind of requirements listed cannot be justified under any circumstances. This reading of the provision also seems supported by the structure of Article 16. As I have shown above, Article 16(1) establishes the conditions under which national requirements may be accepted. If the requirements of Article 16(2) would fall within the category of justifiable requirements in Article 16(1), it would make no sense to have a specific regulation of them in Article 16(2). Therefore I think that Article 16(2) must be understood as an exception to Article 16(1). This means that the requirements listed in Article 16(2) are in principle not justifiable.

I also think that my reading is supported by Article 16(3), which states:

"The Member State to which the provider moves shall not be prevented from imposing requirements with regard to the pro- vision of a service activity, where they are justified for reasons of public policy, public security, public health or the protection of the environment and in accordance with paragraph 1. Nor shall that Member State be prevented from applying, in accordance with Community law, its rules on employment conditions, including those laid down in collective agreements."

As can be seen, Article 16(3) provides for the same justifying considerations as Article 16(1) and it refers explicitly to Article 16(1). The requirements covered by Article 16(3) must however be requirements that are not caught by Article 16(1); if not, Article 16(3) would be superfluous. Therefore I suggest that the requirements of Article 16(3) are those envisaged by Article 16(2). This could at first sight seem contradictory to what I stated before, namely that the ban in Article 16(2) is absolute. However, attention must be given to words *"to which the provider moves"* in Article 16(3), which make it clear that the provision does not apply when the services provider does not move another Member State for providing his service. Therefore, the view that the ban in Article 16(2) is absolute can be upheld, namely to the extent that the service provider does not move. In practice that means that the requirements of Article 16(2) cannot be applied to a service provider that provides his services over the Internet. On the other hand, the ban in Article 16(2) is not absolute when the service provider moves, as the Article 16(2) requirements may be justified under Article 16(3).

I must add that one shall not overrate the practical importance of this distinction between absolutely banned requirements when the service provider does not move and possibly justifiable requirements when the service provider moves. The reason is that it is very probable that in the last situation, it will be very hard for the requirements to pass the proportionality test; for instance, the requirement to have an establishment in the host Member State is an outright negation of the freedom to provide services and will not be accepted by the ECJ.[88]

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[88] See cases 33/74 *Johannes Henricus Maria van Binsbergen v Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid* [1974] ECR 1299, para. 13, and C-393/05 *Commission of the European Communities v Rebublic of Austria* [2007] ECR I-10195.

I must also add that I have not found support in legal literature or other material for my interpretation. In its *Handbook on the implementation of the Services Directive*, the Commission states that (underlining made by me): *"The examples of requirements, which are mentioned in paragraph 2, have already, to a large extent, been subject of the case law of the ECJ and have been found to be incompatible with Article 56 TFEU (ex Article 49 TEC). This is why there is a strong presumption that such requirements cannot be justified by one of the four public interest objectives referred to in Article 16(3) since they will normally be disproportionate."*[89] The Commission thus does not go as far as saying that the ban in Article 16(2) in some circumstances is absolute, namely when the services provider does not move.

Catherine Barnard states that the requirements in article 16(2) are *"particularly suspect"*.[90] Thus, she does either seem to be willing to go as far as saying that Article 16(2) contains an absolute ban when the service provider does not move.

On the other hand, neither the Commission nor Barnard states arguments that invalidate my interpretation. I therefore maintain it. To the extent that the ban in Article 16(2) is absolute, it is a departure from the case law developed on the basis of the Treaty provisions.

4.2.2 Authorisations

Article 16(2) letter (b) provides that the host Member States may not impose

"an obligation on the provider to obtain an authorisation from their competent authorities including entry in a register or registration with a professional body or association in their

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[89] The European Commission *Handbook on the implementation of the Services Directive,* 2007, p.39, chapter 7.1.3.4.

[90] Barnard, Catherine *Unravelling the Services Directive,* CMLRev 45, 2008, p.364.

territory, except where provided for in this Directive or other instruments of Community law."

When I have to interpret this provision, my point of departure is the one that I have stated above, namely that the ban in Article 16(2) is absolute when the service provider does not move and in case he does move, the requirements in Article 16(2) may be justified on the basis of Article 16(3). This must also apply to the authorisation requirements in letter b) of Article 16(2). However, what I want to address now is the meaning of the words *"except for provided for in this Directive"*.

The Services Directive does not contain provisions on specific authorisation procedures. By that I mean that the Directive does not contain for instance provisions concerning a specific authorisation procedure to be fulfilled if a provider wants to exercise a specific economic activity, such as for instance construction. The Directive only contains general provisions on authorisation procedures and they can be found in the Directive's Chapter on freedom of establishment. The words in Article 16(2) *"except where provided in this Directive"* must therefore refer to those general provisions, which I will therefore examine.

Article 9(1) establishes the overall conditions with which an authorisation procedure has to comply.[91] The provision states:

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[91] The provisions of the Services Directive distinguish between "authorisation schemes" and "authorisation procedures", see for instance Articles 9 and 13, without defining the terms. To me it seems that "schemes" refers to the existence of an authorisation procedure as such while the "procedure" refers to an individual procedure. I cannot see that the distinction is relevant for what I am discussing and I will therefore just refer to "authorisation procedures".

"Member States shall not make access to a service activity or the exercise thereof subject to an authorisation scheme unless the following conditions are satisfied:

(a) the authorisation scheme does not discriminate against the provider in question;

(b) the need for an authorisation scheme is justified by an overriding reason relating to the public interest;

(c) the objective pursued cannot be attained by means of a less restrictive measure, in particular because an a posteriori inspection would take place too late to be genuinely effective."

As can be seen, this provision allows for authorisation procedures, not just on the limited number of grounds stated in Article 16(1) and (3), but on the basis of an *'overriding reason relating to the public interest'*. As has been shown earlier this entails an open-ended catalogue of justification grounds. An authorisation procedure based on any of those grounds is allowed as long as a posterior inspection procedure would not be sufficient to safeguard the interest in question.

At this point of my analysis, it seems thus that in respect of authorisation procedures, Member States can submit the service provider from another Member State, exercising the right to freedom to provide services, to the same requirements that are applicable to the one who wants to make use of his right to freedom of establishment. This result could seem harsh to the service provider exercising his right to free movement of services. However, Article 10(3) provides that the requirements for granting authorisation must not duplicate requirements and controls, which are equivalent or essentially comparable as regards their purpose to which the service provider is already submitted in another Member State. This provision would seem to take care of the interests of the service provider exercising his right to free movement of services; he knows that he cannot be imposed requirements that in essence duplicate those to which he is submitted in his State of establishment. He also knows that if any additional requirements are imposed, then it is because the interests that those requirements seek to protect cannot be safeguarded sufficiently through an a posteriori inspection.

My opinion is therefore that if an authorisation procedure is allowed under the Directive's provisions on freedom of establishment, it is also allowed under Article 16(2).

I have not found any legal literature or other material that supports my understanding of Article 16(2) at this point. I must, however, add that I am aware of a reasoned opinion from the EFTA Surveillance Authority (ESA) that seems to contradict my view. The reasoned opinion is of 16 May 2012 and concerns Norway's failure to comply with Article 16 of the Services Directive in the construction sector. I am aware that reasoned opinions are not formally a source of law as they reflect the opinion of an administrative authority. Still, given the expertise and know-how of ESA, it is obviously relevant to mention the opinion.

The reasoned opinion concerns Norwegian rules in the construction sector. The rules entail that in order to build in Norway, the professionals at issue, for instance the constructor or the architect, must first have an authorisation to be *"responsible for the construction"*. The authorisation seeks to ascertain that the professionals have the skills necessary for construction and they seek to protect the buyers of construction services and also the public interest in sound and healthy constructions. ESA holds that the Norwegian rules imply a *'requirement'* within the meaning of the Services Directive and I agree with that view: the Norwegian rules clearly imply a restriction to foreign constructors/architects. In its reasoned opinion, ESA however, goes on to consider that the authorisation procedure can only be justified in the reasons listed in Article 16(3). That is contrary to my opinion: Authorisation procedures that are acceptable under the Directive's provisions on freedom of establishment, are also acceptable under Article 16(2); it is important to stress that for an authorisation procedure to be allowable under the Directive's provisions on freedom of establishment, the objectives of the procedure cannot be met by an a posteriori inspection. Therefore, in my opinion, if the public interests cannot be met by such an inspection, the Member State must also be allowed to require that the service provider exercising his right to free movement of services meet the requirements of the authorisation procedure.

The next section I will discuss will be about my opinion on whether the Services Directive Article 16 will and should work.

5 Will Article 16 work?

In this section of the paper, I will discuss whether the Services Directive Article 16 will work and if it, in my opinion, should work. I find that there are three important issues to discuss. Firstly I shall discuss whether Article 16 will work. Secondly, I shall discuss the convergence of free movement of services with the free movement of goods, i.e. the *Keck* case.[92] At last, I shall discuss if Article 16, in my opinion, should work.

5.1 Will Article 16 work?

The Services Directive was meant to enhance free movement of services, in particular through limiting the number of justification grounds that can justify a national restriction. As I have discussed above, I think that the four justification grounds of Article 16 may be interpreted more widely than what is the case until now. For that reason, the limitation of justification grounds will only work partially.

In the second place, I would like to remark:

As I have shown above, the TFEU contained and contains only a limited set of justification grounds, i.e. Article 52 TFEU (ex Article 46 TEC). One can say that the system with just a limited number of justification grounds did not work, as the list was extended in practice. So, my question is; why should it work this time, when it did not work in the past? Obviously there is a difference between then and now. At the time the Treaty was signed, the Member States did not know that the notion of restriction would be interpreted by ECJ as

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[92] Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

widely as it did. Thus, there was need for extending the list of justification grounds. This time the Member States know what they have signed up for, namely a very wide notion of requirements and a very limited list of possible justification grounds.

In conclusion, I am not fully convinced that the limitation of the justification grounds will work.

The next issue I would like to discuss is the convergence of the free movement of services with the free movement of goods.

5.2 The convergence of the free movement of services with the free movement of goods

I mentioned earlier that the *Keck* case law[93] applies in free movement of goods, but not in the freedom to provide services. So there is no convergence between the two freedoms in this respect: In free movement of goods, rules, for instance concerning advertising, will fall outside the notion of restrictions provided that the rules apply equally to all traders in law and fact. On the other hand, in free movement of services, the rules fall under the notion of restrictions and will need to be justified.

In the case law before the Services Directive, there was a possibility to ensure coherence in the final result as concerns for instance advertising rules that had to be examined under both set of rules. If the rules were outside the notion of restrictions because of *Keck* in free movement of goods, there was the possibility that the same rules would be proportionate in free movement of services. So, the end result would be that the national rules would be allowed to stand.

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[93] Joined cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-6097.

After the Services Directive, such convergence will be more difficult to attain. I will try to explain that with an example: the *Alpine Investment* case[94] concerned rules on cold calling and the justification ground was to maintain the reputation of the financial sector. If one imagines that a ban on cold calling concerned some goods, then *Keck* would apply and the ban would not be a restriction if it applies to all traders equally, in law and fact. The same ban concerning services would not be allowed to stand because the justification ground would not be accepted in Article 16 of the Services Directive.[95] There would be no possibility to reach convergence with the result in the free movement of goods.

I find this very difficult to accept. Why should there be such a difference in result depending on whether one sees the same ban under free movement of goods or free movement of services?

This leads me to my final observations, namely the question if Article 16 should work.

5.3 Should Article 16 work?

This question is of course a question on which there can be many opinions. I understand that Article 16 has an objective that is good for the internal market in the sense that the Article intends to make it easier to provide services from one Member State to another. On the other hand, I think that it is very difficult to understand for citizens that grounds for justifying a restriction can be acceptable in one field of law but not in another. If a Member State has reason to ban cold calling, why should that reason not be valid in free movement of services, but in the other freedoms? I cannot understand it and therefore my answer to the question above is that Article 16 should not work.

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[94] C-384/93 *Alpine Investments BV v Minister van Financiën* [1995] ECR I-1141.

[95] Unless one does as the EFTA Court did in the case E-2/01, *Dr Franz Martin Pucher* (2001/C 242/08). The EFTA Court treated the good reputation of the financial sector as part of the notion of public policy.

6 Conclusion

To sum up my findings I would firstly like to point out that the notion of requirement in Article 16 seems to cover the notion of restrictions in the TFEU. However, when it comes to the discrimination rules, Article 16 seems to exclude that the discriminatory rules may be justified on the basis of the interests enumerated in the TFEU. I have also found that when it comes to the list of justification grounds, Article 16 changes the state of law, i.e. the limitation of justification grounds. After having discussed 16(2), I found that it is a departure from the case law developed on the basis of the Treaty. My opinion on authorisation procedures is that if it is allowed under the Directive's provisions on freedom of establishment it is also allowed under Article 16(2).

When it comes to my opinion of whether Article 16 will work, I have concluded that it will work only partially, i.e. I am not certain that the limitation of justification grounds will work. I also find it difficult to accept that there should be a difference in result depending on whether a ban is under free movement of goods and free movement of services. My opinion on whether Article 16 should work is that it should not, because of the differences in result when it comes to free movement of services and to the other freedoms.

In conclusion, after having interpreted Article 16 extensively, I have found that Article 16 goes beyond a codification. In my opinion will Article 16 not be successful.

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